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March 31, 2003

VIA FACSIMILE TRANSMISSION (202) 622-1657

Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Attention: Request for Comments

Re: Department of the Treasury, Office of Foreign Assets Control
Reporting and Procedures Regulations; Cuban Assets Control
Regulations, Publication of Economic Sanctions Enforcement Guidelines
Proposed Rule and Request for Comments

Dear Sir or Madam:

Xael Charters, Inc. ("Xael") respectfully submits these brief comments on the Office of Foreign Assets Control's ("OFAC") proposed Economic Sanctions Enforcement Guidelines ("Guidelines") and Appendix to 31 C.F.R. Part 515 ("Appendix").¹ Xael is an OFAC-licensed Carrier Service Provider ("CSP") and Travel Service Provider ("TSP"). Xael's operations are governed by numerous agencies and regulations including OFAC and its Cuban Assets Control Regulations. The proposed Guidelines and Appendix are directly applicable to Xael's operations.

I. Proposed Appendix to Part 501 - Economic Sanctions Enforcement Guidelines

Section III (Civil Penalties) of the proposed Guidelines details OFAC's general policy with respect to the assessment of civil penalties for violating applicable statutes, Executive Orders, and regulations administered by OFAC. Subsection A lists the Most Frequent Categories of Violations Resulting in Civil Penalty Action and the Penalties Proposed by OFAC. Paragraph 5 of this subsection discusses *Travel, Carrier, and Remittance Forwarding Service Provider Violations (Cuba)*, and directs the reader to the annual Service Provider Program Circular for "the criteria for imposition of civil penalties for violations relating to the provision of travel,

¹ See 68 Fed. Reg. 4422 (January 29, 2003).

March 31, 2003

Page 2

carrier, and remittance-forwarding service" by licensed Cuba service providers.² The most recent "annual" Service Provider Program Circular is dated September 2001 ("Circular 2001").³ Circular 2001 contains Basic Prohibitions and Penalties (Part I), Authorizations for Individuals (Part II), Authorization for Service Providers (Part III), and Appendices with specific instructions for CSPs, TSPs, and RFs. Significantly, however, Circular 2001 does not contain a single criterion for the imposition of civil penalties. To remedy this omission, OFAC should revise the Appendix to include the criteria for imposition of civil penalties for violations by licensed service providers. The proposed Appendix already contains penalties for the provision of services by unlicensed service providers. Xael's suggested revision would ensure that the criteria for imposition of and penalties for violations relating to the provision of services by both licensed and unlicensed service providers are contained in one location and would avoid the need to refer to and rely on Circulars that may or may not be up to date. In the alternative, OFAC should issue a new Circular as soon as possible, which contains the criteria for imposition of civil penalties for violations by licensed service providers. OFAC should also give interested parties an opportunity to comment on these criteria just as it has given interested parties an opportunity to comment on the criteria for imposition of civil penalties set forth in the rest of the Guidelines.

Paragraph 6 of Subsection A of the Guidelines contains the criteria for proposing a penalty related to the *Requirement to Furnish Information; Reporting and Recordkeeping*. Paragraph 6 states however that criteria for licensed Cuba service providers will be found in the annual Service Provider Program Circular. Although Circular 2001 contains the requirements for recordkeeping and reporting, it does not contain the criteria for proposing a penalty related to violations of these recordkeeping and reporting requirements. To remedy this omission, OFAC should revise the Appendix so that criteria for proposing a civil penalty for violations of the reporting and recordkeeping requirements are contained in the same location as criteria for other violations by licensed Cuba service providers. Xael's suggested revision would prevent readers from having to refer to and rely on Circulars that may or may not be updated. In the alternative, OFAC should issue a new Circular as soon as possible that contains the criteria for proposing a penalty related to violations of the reporting and recordkeeping requirements. OFAC should give interested parties an opportunity to comment on these criteria just as it has given interested parties an opportunity to comment on the criteria for proposing a penalty as set forth in the rest of the Guidelines.

² See 68 Fed. Reg. 4427.

³ The Introduction to the Circular states: "This Circular will be reissued in its entirety in September of each year, bearing the name of the year in which it is issued." See Circular 2001 at p. 2. No new Circular was issued in September 2002 nor has any new circular been issued to date.

March 31, 2003

Page 3

II. Proposed Appendix to Part 515

The Note prior to the Appendix directs the reader to Subpart G of the Cuban Assets Control Regulations (31 C.F.R. Part 515) and to the Guidelines for additional information on the civil penalty process. It is not clear to Xael, however, which provisions of the Guidelines apply to violations of the Cuban Assets Control Regulations. That is, Xael is not certain whether the cautionary and warning letters described in Parts II (B) and (C) of the Guidelines constitute the "prepenalty notice" required by 31 C.F.R. §515.702. Xael respectfully requests that OFAC clarify which provisions of the proposed Guidelines apply to the Cuba sanctions program.

OFAC proposes to define "agency notice" as "any evidence in the administrative record of written or oral communication [e.g., a telephone conversation] between OFAC and the party alleged to have committed a violation."⁴ OFAC further states: "[a] party may dispute the adequacy of agency notice in its response to the prepenalty notice."⁵ Xael is particularly troubled that the definition of notice would expressly include oral notice. OFAC's Miami Sanctions Office regularly telephones licensed Cuba service providers to request information, which the service providers routinely give to OFAC without question. OFAC does not disclose to the service providers, however, that a seemingly benign telephone call may constitute the initiation of an investigation. Similarly, OFAC does not disclose that any subjective notes recorded during these telephone conversations may be made part of an administrative record or that the information the service providers give during these calls may later be used against them in an administrative proceeding. The service provider has no opportunity to confirm that the notes taken during the call accurately reflect the information provided.⁶ OFAC's statement that a party may later dispute the adequacy of notice is impractical. By the time the service provider receives a prepenalty notice and obtains a copy of the administrative record, the conversation may have taken place many months or even years prior and the service provider will not have as clear a recollection of it as he would if he received a contemporaneous written summary of it. Accordingly, Xael requests that oral notice be removed from the definition of notice. In the alternative, Xael requests that OFAC be required to follow each instance of oral notice (whether telephonic or personal) with a written summary of the conversation or a copy of the notes placed in the administrative record. Each party will then have a written record of the notice.

⁴ See 68 Fed. Reg. 4429 (emphasis added).

⁵ *Id.*

⁶ Xael understands that OFAC officials often communicate with service providers in Spanish. Presumably these officials then translate the substance of the conversation into English for inclusion in the administrative record. For those officials who do not speak Spanish as a first language, this translation process complicates the oral notice provision even further since the officials' interpretation and translation of the conversation may differ enormously from that of the native Spanish speaker.

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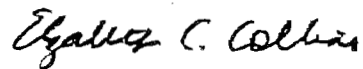
March 31, 2003

Page 4

Note B to the proposed Appendix states that violations by licensed service providers are addressed in the annual Service Provider Program Circular. As stated above, Circular 2001 does not contain information regarding violations. Xael respectfully requests that OFAC revise the Appendix to address violations by licensed service providers. In the alternative, Xael requests that OFAC revise Circular 2001 as soon as possible to address violations by licensed service providers. OFAC should also give interested parties an opportunity to comment on these revisions just as it has given interested parties an opportunity to comment on the proposed language set forth in the rest of the Guidelines.

Xael appreciates the opportunity to comment on these proposed Guidelines and Appendix to Part 515. Please do not hesitate to contact the undersigned with any questions.

Sincerely yours,



Elizabeth C. Collins
Counsel for Xael Charters, Inc.

Copy: Xiomara Almaguer-Levy